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No. 85-1384

In the Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM R. TURNER; CATHY CROCKER; EARL ENGELBRECHT; BETTY BOWEN; BERNICE E. TRICKEY; HOWARD WILKINS; JANE PURKETT; WILLIAM F. YEAGER; LARRY TRICKEY, Employees of the Department of Corrections and Human Resources for the State of Missouri, *Petitioners,*

vs.

LEONARD SAFLEY, et al., MARY WEBB, et al., individually and as a class of similarly situated people, *Respondents.*

DR. LEE ROY BLACK; W. DAVID BLACKWELL; DONALD WYRICK; BETTY BOWEN; EARL ENGELBRECHT, Employees of the Department of Corrections and Human Resources for the State of Missouri, *Petitioners,*

vs.

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ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

I.

The Appeals Court Incorrectly Applied the Least Restrictive Alternative Test to the Department of Corrections' Regulation of Inmate-to-Inmate Correspondence and Erred in Requiring the Defendants to Present Evidence of a Pattern of Security Concerns.

Petitioner files this Reply Brief to address the points raised by the respondents (hereinafter the "plaintiffs") in their brief and by the brief filed by the amici curiae.

The plaintiffs' arguments, as outlined in their brief, can be distilled to one fundamental proposition. Plaintiffs propose that the lower courts' decisions should be upheld because the issue is one of "pure, innocent speech" as opposed to areas of the First Amendment which are, in the plaintiffs' minds, considered peripheral. (*See*, Brief of Respondents, pp. 33-34.) In fact, plaintiffs propose a graduated scale of "core" rights that would receive higher protection over other arguably less important peripheral rights. (*See*, Brief of Respondents, p. 34.)

Although the defendants are uncomfortable with any proposition which would label constitutional rights such as voting, travel, privacy in everything except the decision to marry, and the First Amendment in all exercises except innocent communication as peripheral, it is believed that the best response to plaintiffs' argument is to point out that it is wrong. This Court has not taken the position that some rights are more equal than other rights. In fact, this Court has expressly noted that there is "no principled basis on which to create a hierarchy of constitutional values". *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 484 (1982). There is no legitimate basis for the plaintiffs' proposal that the test employing the least restrictive alternative analysis should be applied to certain "fundamental" rights and a more deferential test be applied to "peripheral" rights, such an approach would lead to chaos in both the courts and in the prison community as everyone attempted to grapple with a tiered system of review of constitutional rights.

Furthermore, the plaintiffs have made much of the fear that the rational relations test would permit too much deference to the professional judgment of prison administrators.[1] Deference to the professional judgment of prison administrators is a reasonable approach when addressing the intricate and difficult problems of the administration of a prison. It is not, as the plaintiffs complain, a matter of permitting the prison administrators too much discretion, rather, it is a matter of permitting them enough discretion to anticipate problems in their prison. If a prison administrator disregards constitutional rights or takes actions in bad faith or without legitimate basis, he would not be insulated from review. *Whitley v. Albers,* ..... U.S. ....., 106 S.Ct. 1078, 1085 (1986). The standard

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1. Plaintiffs have attacked the defendants' arguments by attacking the defendants personally. In the court below, defendant Turner was alleged to be unqualified to make decisions affecting the lives of inmates because he had once been a guard and did not have a college education. Mr. Wyrick is alleged to have been frequently challenged in the lower courts because of his "scorn" for inmates' First Amendment rights. *Citing*, dissenting opinion, *Hill v. Blackwell,* 774 F.2d 338, 348 (8th Cir. 1985). In spite of the scolding by Judge Arnold, the Eighth Circuit found in favor of the Department of Corrections using an analysis which is remarkably similar to the analysis requested by the defendants in the present case. For the record, Mr. Wyrick has also had his share of compliments for his efforts in the field of corrections. *See, Burks v. Teasdale,* 492 F.Supp. 650, 682 n. 34 (Mo.W.D. 1980).

of review proposed by defendants permits the prison officials the discretion to administer their prisons unless there is substantial evidence that the disputed practice constituted an exaggerated response to the legitimate penological goal or that the beliefs of the prison officials were unreasonable. *See, Pell v. Procunier,* 417 U.S. 817, 827 (1974); *Jones v. North Carolina Prisoners' Labor Union, Inc.,* 433 U.S. 119, 128 (1977).

The use of the least restrictive alternative test, however, would cause a number of problems. The use of that test would require courts to determine what activities are inherently dangerous, a pursuit which is sometimes more difficult than it seems, and one which would lead to conflicts among the circuits. The choosing of the least restrictive alternative would result in court entanglement in the day-to-day operation of every conceivable activity and facet of prison life. It could lead to plainly bad decisions which would endanger the safety of staff and prisoners.

> Judges, after all, are human. They, no less than others in our society, have a natural tendency to believe that their individual solutions to intractable problems are better and more workable than those of persons who are actually charged with and trained in the running of a particular institution. . .

Bell v. Wolfish, 441 U.S. 520, 562 (1979). *See also, Illinois Election Board v. Socialist Workers Party,* 440 U.S. 173, 188 (1979) (Blackman J., concurring) ("a judge would be unimaginative indeed if he could not come up with something a little less "drastic" or a little less "restrictive" in almost any situation. . . .") In fact, when dealing with a prison rule or practice, it is an inappropriate function of the reviewing court to consider a panoply

of alternative measures and to select one it believes the most desirable. Instead, the proper inquiry would seem to be whether the rule or practice in question constitutes a valid exercise of professional judgment. This standard has been held by this Court to apply even in a situation where an individual's constitutional rights are not subject to the restrictions which are incident to lawful incarceration. One such case is *Goldman v. Weinberger,* ..... U.S. ....., 106 S.Ct. 1310 (1986), which could be argued as closely analogous to the present one.[2] In *Goldman,* an Orthodox Jew challenged the military regulation not permitting him to wear a yarmulke. This Court upheld the regulation concluding that it was not the duty of the Court to select between conflicting and equally valid professional opinions as to whether the regulation was necessary to military goals but, rather, only to determine that there had been, in fact, a valid exercise of professional judgment instituting the regulation at issue. *Id.* at 1314. *See also, Youngberg v. Romeo,* 457 U.S. 307, 321 (1982) (similar deference to the judgments of mental health professionals). It would be ironic if the Constitution could be interpreted to permit more restrictions on the exercise of a Marine's First Amendment rights than to a prisoner who has been convicted of a felony and who may demonstrate a "proclivity for anti-social, criminal and violent behavior." *Hudson v. Palmer,* 468 U.S. 517,

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2. This Court has noted a parallel between the exercise of the First Amendment rights in the military and in the penal context. *See, Jones v. North Carolina Prisoners' Union, Inc., supra,* 433 U.S. at 133-134. Successful operation of the military and prisons requires expertise particular to individuals responsible for those functions. *See, Chappell v. Wallace,* 462 U.S. 296, 305 (1983). In each area, when reviewing a particular practice, courts have deferred to the expertise of the respective officials in those areas. *See, Rostker v. Goldberg,* 453 U.S. 57, 66-67 (1981).

526. Such a result is inappropriate because the differences in the two circumstances are obvious. In a prison, there is an "ever present potential for conflict and conflagration." *Whitley v. Albers, supra,* 106 S.Ct. at 1085, citing *Jones v. North Carolina Prisoners' Union, Inc., supra.* On an even more practical level, many of the standards applied pursuant to the least restrictive alternative test cause daily administration problems for the prisons. Under this standard it would be difficult, if not impossible, for corrections officials to anticipate what is required of them. Only after a matter is resolved by litigation would a prison official actually know if a measure is constitutionally acceptable.

This would lead to administrator's concerns that, ultimately, they might be subject to damage awards or at least costly litigation which will stultify the exercise of their best professional judgment and will inhibit the initiative for new programs within the prison. Knowing that their choice among several available security measures may be scrutinized by a federal court in terms of imposing the least restriction on inmates' rights, prison officials are likely to institute regulations less restrictive than those they believe, in their professional judgment, are warranted. Similarly, officials may be reluctant to initiate new or experimental programs which might be beneficial to prisoners if there is a possibility that the relevant rules and regulations might be determined to constitute an improper infringement of inmates' constitutional rights.

This could lead to the most serious consequence all. that prison administrators may implement a measure which, in the judgment of their lawyers, may be the least restrictive alternative, but will result in tragic and irreparable injury. Although the unfettered exercise of the

First Amendment is a goal that should be striven for in a prison forum, as well as a public forum, the protection of the internal security, the protection of the staff, and of other inmates, has to be carefully weighed. The nearly impossible task of reviewing every piece of mail will not solve the problems but will beg for a misstep by an employee, a misstep which will result in tragic error. Some courts have recognized the difficulties in discovering the codes in inmate correspondence and the control of gangs. *See, Gometz v. Henman,* No. 85-3123 (7th Cir., Dec. 8, 1986) p. 4-5 (dicta).[3]

The plaintiffs make much of *Shabazz v. O'Lone,* 782 F.2d 416 (3rd Cir. 1986), *cert. granted* (October 1i, 1986, No. 85-1722) in which the Third Circuit modified its decision in *St. Claire v. Cuyler,* 634 F.2d 109 (3rd Cir. 1980). Since this is a subject of a pending argument and can be best presented by the advocates in that case, the defendants will not dwell at any length on the decision. The rationale, however, employed in *Shabazz* seems to violate the principles previously enunciated by this Court.

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3. The *Guajardo* amicus curiae propose that the record is distorted and incomplete because the inmates did not cross-examine the prison officials. The information provided to this Court by Texas in its filing is not misleading. That the inmates in Texas do use codes and plot murder in their correspondence is eloquently demonstrated. The defendants submit that the reasons behind the settlement of the issue is not known to these defendants and is irrelevant to the case now before this Court.

The *Guajardo* amicus also purports to present evidence that inmate correspondence is not a "significant" factor in the control of prison gangs. A review of cited material indicates that such a statement is not substantiated. The authors surveyed various state prison systems for strategies to combat gangs. The study did find the most accepted curative measure for combatting gangs was isolation. *See,* G. Camp & C. Camp, *Prison Gangs: Their Extent, Nature and Impact on Prisons* (1985) p. xvii. One would think that goal is best achieved by control of communication. The report also found Missouri to be a state in which gang problems have a high profile. *Id.* at 47, 154.

In *Shabazz,* the Court applied a standard which only permitted regulations which further security interests to be upheld. *Shabazz v. O'Lone, supra* 782 F.2d at 420. It seems that the rehabililtation of prisoners, the deterrence of crime, and the isolation of offenders from the rest of society are interests that are no longer applicable in this area. Such a result is contrary to this Court's principles. *Jones v. North Carolina Prisoners' Union, Inc., supra,* 433 U.S. at 129. Finally, the Court in *Shabazz* applies a modified least restrictive alternative test which would invite judges to substitute their judgment for that of the prison officials. *Id.* at 424, 429. Again, such a result is contrary to this Court's instructions. *Block v. Rutherford,* 468 U.S. 572, 589-90 n. 10. A more persuasive argument is made by the Fourth Circuit in *Vester v. Rogers,* 795 F.2d 1179 (4th Cir. 1986). In *Vester,* the Court specifically noted the difference between *Procunier v. Martinez,* 416 U.S. 396 (1974); *Pell v. Procunier, supra,* and the subsequent cases. *Id.* at 1181. Although in *Vester* the prison officials permitted alternative means of communication through civilians, they also noted that a regulation which permitted correspondence between institutions upon approval of the wardens was not a regulation that totally prohibited communication. *Id.* at 1183 n. 5. Even among those inmates who would be prohibited from corresponding with inmates at other institutions, all communication is not stopped since they would still be able to correspond with non-prisoners, and even those inmates who have been released.

In conclusion, the decision of the Eighth Circuit Court of Appeals should be reversed and the injunction dissolved.

II.

The Appeals Court Incorrectly Applied the Least Restrictive Alternative Test to the Missouri Department of Corrections Marriage Rule and Erred in Requiring Defendants to Present Evidence of a Pattern of Security Concerns.

In responding to the defendants' arguments that the lower court used an improper standard of review, the plaintiffs present the argument that prison officials only deserve deference in a few specific areas of expertise in which the plaintiffs would consider them qualified to render an opinion. (*See,* Respondents' Brief at p. 46.) The plaintiffs also assert that the evidence showed that the appellees exaggerated their response to the perceived legitimate penological goals.

Somewhere between the principle that an inmate does not leave his rights at the prison door and the reality of the difficulties of prison administration, this Court is going to have to strike a balance. The plaintiffs strike the balance in favor of the inmates since they are adults and have rights which should only be burdened in the least restrictive manner and only then with the inmates' willing cooperation. The defendants, on the other hand, strike the balance in favor of the prison officials since the inmates' adulthood has not saved them from the voluntary commission of felonies and the unwillingness, in some cases, not to continue a life of crime, violence and abuse while in prison. It is the officials of the prison who have to order, cajole or persuade their charges to rehabilitate. It is the prison officials who have to inform unwilling and sometimes very bad people that what they have done in the past is not what they are going to do in prison. It is the prison officials who run all the risks and have to pro-

vide all the protection. The plaintiffs' arguments are nothing more than an invitation to this Court to apply an incorrect legal principle and close its eyes to the difficulties of prison administration.

It is believed that it is admitted by all concerned that the Renz Correctional Center is still a different prison from most others. *Safley v. Turner*, 586 F.Supp. at 590-591 (W.D. Mo. 1984). The problems with the day-to-day management, the maintenance of internal security, and the rehabilitation of inmates are, at best, extraordinarily complex problems and invariably subject to second-guessing by others. It is easy enough to say that Superintendent Turner was wrong in every single decision he made concerning the rehabilitation of his inmates and the security of his institution.[4] It is also unfair.

The plaintiffs have made much of the fact that the term "compelling interest" was not defined in the regulation. It was, however, defined and understood to mean basically some sort of prior relation between inmates. The plaintiffs' allegation that defendants had different definitions is not exactly accurate. Naturally, there are differences in syntax and explanation, but the witnesses describe fundamentally similar interpretations of the regulations. (Vol. I, Tr. 215-217; Vol. IV, Tr. 24, 30 to 37.) It is inherent to the exercise of discretion in a prison, and in other places, that different administrators place differ-

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4. The plaintiffs have made reference to the marriage of Mr. Safley and Ms. Watson in the courtroom of the District Court. It is very much a relief that Ms. Safley's conduct improved after her marriage, but it is difficult to understand the District Court's statement that there was not any substantial state interest in preventing the marriage since there was no hearing in which the prison officials could testify concerning any state interest. (Vol. V, Tr. 121.); *Safley v. Turner, supra*, 586 at 594 n. 1.

ent emphasis on different factors. It is impossible always to forecast every eventuality in the exercise of discretion, and the bureaucratic definitions often do nothing more than stifle its compassionate exercise. As we have noted repeatedly, the marriage between two inmates in prison is, from the testimony, seldom a good idea. (Vol. III, Tr. 156.)[5] If it was not for a third party, a child or some other special interest and relationship, the prison authorities probably would not approve, wholesale, marriages between inmates, (Vol. III, Tr. 152-155; Vol. IV, Tr. 20-21.) As was noted repeatedly at the trial, in the unreal world of prison society, inmates have a bad effect on each other. (Vol. III, Tr. 153, 156; Vol. IV, Tr. 110.) The plaintiffs in this case put themselves in prison by making some very bad life choices. Most women prisoners make them because of the men with whom they chose to associate. (Vol. III, Tr. 154.) It is ironic that the Court found that it was appropriate to ban visits of former inmates based on the evidence that the ban tends to break up criminal associations, yet will not let officials stop associations through marriage.[6]

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5. We would like to apologize to the plaintiffs and to the Court for the miscitation in the petitioner's brief. We never intended to indicate to this Court that an inmate had indicated that marriage between inmates is very seldom a good idea. It was intended that the testimony should be attributed to the defendants.

6. The plaintiffs charge that the defendants mislead the Court in its citation to the transcript. The defendants stand on their citations and interpretation of the record (*see*, footnote 16, Respondents' Brief, p. 44). Relevant to the issue presented is what Superintendent Turner perceived to be the reasons for the marriages and how that affected legitimate penological interests. He believed he had reasonable cause for the denial of permission. This highlights the precarious legal position of most superintendents. On the one hand, they have the affirmative duty to protect inmates and yet their perceptions of potentially violent confrontations are characterized as an implicitly trivial "lover's quarrel". *Safley v. Turner*, 586 F.Supp. 589 (W.D. Mo. 1983).

The plaintiffs also make the argument that deference is not justified where "prison guards turned superintendent presume to exercise a power over adults for which they have no training and no expertise." (Respondents' Brief at p. 46.) This startling assertion is an absolutely incorrect application of the principles of deference to prison officials. This Court has explicitly indicated the deference that is to be given to prison officials is a matter of expertise and comity. Justice Rehnquist noted in *Bell v. Wolfish*, 441 U.S. 520, 548 (1979):

> We further observe that, on occasion, prison administrators may be "experts" only by Act of Congress or by state legislature. But judicial deference is accorded not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but also because the operation of a correctional facility is particularly a province of the Legislature and the Executive branch of our Government, not the Judicial.

Further, and importantly, Superintendent Turner has dealt with female inmates with a maximum security level classification intermingled with men of a minimum level security for the past ten years. (Vol. II, Tr. 68-74.) In that time, as his testimony indicated, he has sought to increase the educational and treatment opportunities for the inmates under his care and custody. (Vol. II, Tr. 59-63.) He is well-respected by his peers and supervisors. Superintendent Turner would qualify as an expert in either the co-correctional field or womens' prison administration, in any court and any jurisdiction in this country. The mere lack of his collegiate degree is no bar for his qualification as an expert in this area. He is entrusted with the responsibility of making decisions which control and affect the health and safety of inmates. Those decisions have to sometimes be made at a moment's notice and always without the benefit of hindsight. The District Court did not question Mr. Turner's sincerity, ability or judgment; it would only have done things differently.

In conclusion, the decision of the Court of Appeals should be reversed.

III.

The Trial Court's Findings of Fact Were Clearly Erroneous in That They Were Insufficient to Support the Order of the Court and Proceeded From an Erroneous Conception of Applicable Law.

Essentially, the plaintiffs argue in their brief that the findings of facts are not clearly erroneous because the defendants' witnesses were not credible. They bolster their argument with a dissenting opinion in an unrelated case. (*See*, Plaintiffs' Brief, p. 26.) The plaintiffs' arguments miss the thrust of the defendants' argument. It is the defendants' position that the District Court relied on an erroneous conception of applicable law and did not have sufficient basis through its findings to impose a system-wide injunction.

The plaintiffs argue that the findings made by the District Court are not the type that are based on a particular standard of review. The defendants are somewhat at a loss in determining how to respond to such an assertion. The defendants will grant that many of the findings are irrelevant to the plaintiffs' causes of action. *E.g.*, *Safley v. Turner, supra*, 586 F.Supp. at 591-593 (findings 9, 10, 11, 19, 28, 29, 30, 31, 32, 33, 34.)

For example, in finding eleven, the plaintiffs argue that the defendants are not familiar with their rules concerning legal mail because of a regulation indicating that inmates *will be* permitted to correspond concerning legal matters. (*See,* Respondents' Brief, p. 27.) In a way, this highlights the difficulties with the plaintiffs' and the District Court's findings. In this instance, we have a finding of a violation of allegedly constitutional proportion which is essentially irrelevant to the plaintiffs' cause of action. The plaintiffs alleged not that we interfered with their legal mail, but that we did not permit correspondence between inmates. One does not necessarily have anything to do with the other. Furthermore, the regulation did not give the inmates any automatic right to correspond with one another because they affixed the legend "legal" and sent it to another inmate. For the plaintiffs and the Court to have interpreted the rule in such a matter is essentially in violation of accepted constitutional principles. *Wolff v. McDonnell*, 418 U.S. 539 (1974), does not require prison officials to treat non-privileged mail as privileged unless it clearly is marked as originating from an attorney, including his return address. The regulation specifically notes that the review would be based on "the return address on the outside of the envelope". *Id.* at 576. (*See*, 20-118.010(2)(b) (J.App. 35). *See also; Jensen v. Klecker*, 648 F.2d 1179, 1182-1183 (8th Cir. 1981). In the present case, the Court, by making this finding, flatly misapplied the law enunciated by this Court in *Wolff v. McDonnell*. There is nothing in *McDonnell* which could possibly give any other interpretation and nothing in any other part of the regulation permitting inmates to correspond concerning legal matters which would change the interpretation of the regulation. The interpretation is even in conflict with the law of the

Eighth Circuit. *Harrod v. Halford*, 773 F.2d 234, 235-236 (8th Cir. 1985). Finally, although the Court found that "legal mail" was opened up, it found no constitutional violation, nor did it order any legal remedy. It is almost as if most of these findings of fact were not relied on for anything except some purpose of scolding the defendants. Whether that is appropriate or not is not at issue. It is, however, clear that they do not support the injunction, and they should be reversed.

Significantly, plaintiffs propose that the "record" reveals a pattern or practice of deep hostility toward the inmates' attempts to exercise their marriage and correspondence rights. (*See,* Respondents' Brief, p. 28.) The plaintiffs no lor.ger seem to put their reliance on the findings of fact made by the District Court in this case. If they had, they would be forced to admit that the Court did not find any pattern and practice of constitutional violation. It found, at best, "instances" and "occasional" violations of constitutional rights. Even occasional breaches of a constitutional right are regrettable, but, standing alone, they indicate a system that may be inefficient, but surely not unconstitutional.

Finally, and most significantly, the Court ordered the defendants to find a less restrictive alternative to its inmate to inmate correspondence and marriage rules. It never enjoined or modified any of the existing regulations concerning correspondence to non-inmates and/or legal mail. No damages or remedial actions were ordered.

CONCLUSION

In conclusion, the District Court was clearly erroneous when it entered the findings in the case at bar, and there is no basis for its findings that the rules were enforced in an arbitrary or capricious manner.

The decision of the Circuit Court should be reversed.

Respectfully submitted,

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